IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1519 OF 1990

1. Ramrao Kashinath Abande
   Age major, occ. Private service
   r/o Lali, Tq.Udgir, Dist. Latur

2. Shivaji Kashinath Abande
   Age major, occ. Private Service
   R/o as above.

3. Umakant Kashinath Abande
   Age minor, u/g of petitioner no. 1

4. Sunderabai W/o Kashinath Abande
   Age 55 years, occ. Household
   r/o as above. PETITIONERS

VERSUS

Maling Mahtoba Upadhye RESPONDENT
Deceased
Through Legal Heirs

1-A Hassan Malang Upadhye
Age 60 years, occ. Labour
r/o Lali (Bk), Tq. Magrul
Tq. Jalkot, Dist. Latur

1-B Sugram Malang Upadhye
Age 58 years, occ. Labour
r/o as above.

1-C Gopal Malang Upadhye
Age 50 years, occ. Labour
r/o as above.

1-D Sikandar Malang Upadhye
Age 40 years, occ. Labour
r/o as above.

Shri B.A.Darak, Advocate for petitioners
Shri V.N.Damle, Advocate h/f
Shri S.V.Shinde, for respondent.

CORAM : A.V.Nirgude, J
DATE : 18/7/2009

ORAL JUDGMENT :

1. Heard the counsel for the parties.

2. The facts leading to the filing of the writ petition are, in short, as under :-

3. The petitioners are the owners of the agricultural land Survey No. 54/1 having area of 18 acres and 8 gunths at village Lali, tq. Udgir, Dist. Latur (henceforth referred to as the land). The original respondent Maling Mahtoba Upadhye, in the year 1969, filed a Regular Civil Suit No. 129/1969 against the father of the petitioners nos. 1 to 3 and husband of the petitioner no. 4 for specific performance of contract of sale of the disputed land and for perpetual injunction. The original respondent then claimed that, he was in possession of the land as the tenant and he also claimed that he had agreed to purchase the land from the father of petitioner nos. 1 to 3. The petitioners denied both the claims.

The issue of tenancy was framed by the trial

court. It was referred to the Tenancy Court for the decision. Before the Reference could be decided, the respondent requested to trial court to call back the Reference saying, he did not want adjudication on the question of tenancy. Accordingly, the Reference was called back. The respondent's suit for specific performance was decreed. The petitioners then filed Appeal No. 215/1972 before the District Court, Latur, which was allowed and the decree was set aside. The respondent did not take the litigation further.

Thereafter, the petitioners filed a suit for possession of the land against the respondent saying that, he was a trespasser. The respondent once again claimed by way of defence that he was a tenant. On the basis of this defence, the respondent requested the trial court to refer the issue of tenancy to the Tenancy Court. But the trial court rejected his application. The trial court did not even frame the issue of tenancy. The order of the trial court was further challenged in

this court by way of Civil Revision Application, but the same was dismissed summarily in the year 1982.

During the pendency of the petitioners' suit, the respondent filed an application under Section 8 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (Hereinafter referred to as the Act for the sake of brevity) and sought adjudication on the question as to **whether he was tenant in respect of the suit land**. (During the pendency of this application, the suit, referred to above, was decreed on 31/1/1983. Even the appeal filed by the respondent against the said suit was dismissed. So also, the Second Appeal filed against the said judgment was dismissed in the year 1988.)

4. The Tahsildar in the proceedings under Section 8 of the Act issued notice to the petitioners. The petitioners pointed out the history of the litigation and in view of the same, urged the Tahsildar to reject the application on preliminary ground of

maintainability. The Tahsildar accepted the contention of the petitioners and rejected the application saying that it was not maintainable in view of the fact that the petitioners had earlier sought withdrawal of the issue of tenancy from the Tenancy Court. Against this order, the respondent preferred an appeal before the Deputy Collector, Land Reforms, Latur. The Deputy Collector allowed the appeal partly and remanded the case back with direction to the Tahsildar that he should examine the merits of the case giving opportunity to both the parties. In short, **the Deputy Collector suggested to the Tahsildar that he should decide the issue of tenancy on the facts.** This order of the Deputy Collector was further challenged by the petitioners before the Maharashtra Revenue Tribunal. **The learned Member partly allowed the revision and held that, the Deputy Collector could not have remanded the case back to the Tahsildar, but should have decided the question as the preliminary issue.** So saying, the learned Member remanded the case back to the Deputy Collector. This

judgment is under challenge in this petition.

5. After hearing both the sides, the question that is required to be answered in this petition is whether the respondent's application seeking withdrawal of the reference to the Tenancy Court for deciding the issue of tenancy amounted to giving up of his claim of tenancy right in respect of the suit land? Did it amount to waiver of such right?

It is common ground that the respondent since prior to 1969 was in possession of the suit land. When he filed suit (RCC No. 129/1969), he claimed that he held the land in the capacity of tenant. The petitioners denied this claim. So, issue of tenancy arose between them in the said suit. As said above, although the issue of tenancy was referred to the Tenancy Court, before the same could be decided on merits, it was sought to be withdrawn and the same came back undecided. It is, thus, common ground that **the**

question as to whether the respondent was tenant in respect of the suit and has never been decided by the Tenancy Court. The question is whether in such situation the respondent had lost his right to get the said question decided in Section 8 of the Act.

6. The learned counsel Mr.V.N.Damle appearing for the respondent placed reliance on the judgment of our High Court in case of Shaikh Usman Shaikh Burahan and others Vs. Shaikh Badruddin Shaikh Bhagan (1994 MhLJ 828) and argued that if at all the defendant is tenant of the suit land, his right is statutory one and would not get defeated even though he had sought withdrawal of issue of tenancy from the Tenancy Court at one point of time. He also argued that, the act of withdrawal of the issue from the Tenancy Court would not amount to abandoning such right. He further argued that, the act of withdrawal of issue from the Tenancy Court would not amount to estoppal or waiver. The learned counsel for respondent, relies on the following passage from the

above mentioned judgment:

> “8 ..... He argues that in the proceedings before the revenue authorities in respect of the record of rights, defendants have not contended that they are tenants and, therefore, it will have to be presumed that they have waived the right. The generally connotation of “waiver” is that to constitute waiver there must be intentional relinquishment of known right or the voluntary relinquishment or abandonment of known existing legal right. It can either be express or can be inferred from the conduct of the parties. But the conduct must be of such a nature which would warrant the inference as the only conclusion derivable from the contract. There can be waiver of a right crated by the contract. But there cannot be a waiver of any right which has been protected by the statue or is a fundamental right. . . . . Though it is true that a right of tenancy is not a fundamental right, nevertheless it is a right created by the statute. Even the tenant willfully cannot surrender his tenancy rights except in accordance with the procedure laid down in the statute and even that will have to be accepted by the Tahsildar. This is the check against the undue influence, misrepresentation, fraud or other allurement by which tenant may surrender his tenancy rights. The Legislature wanted that the tenancy right should not be easily taken away and, therefore, special statutory protection has been granted to the agricultural tenancy. Can it be waived by a person? Answer is invariably in the negative. ..... . “.

In view of the observations quoted above, it is

really immaterial that the civil court rejected the respondent's application for referring the issue of tenancy to the Tenancy Court in the subsequent suit and the same was upheld by the District judge as well as this court. The issue of tenancy, if it is raised, has to be decided under Section 8 of the Act. The language of the Section 8 of the Act particularly permits this possibility. The Section 8 of the Act reads as under :-

> "8. If any question arises whether (any person is or was at any time in the past a tenant), the Tahsildar, after holding an enquiry, decide such question."

As against this the learned Advocate for the petitioners placed reliance on the judgment of the Supreme Court in the case of Brijendra Nath Bhargava and anr. Vs. Harsh Wardhan and others [(1998) 1 SCC 454]. The facts of the case were quite different. That was a case where the landlord sought eviction of the tenant on the ground that the tenant had made material alteration in the tenanted premises. However, the Supreme Court

held on facts that the landlord had given his implied consent to the erection of the structure which he subsequently objected as being alteration. The Supreme Court held that, the landlord, thus, had waived his objection to the offending structure. So, it held that, if a party gives up the advantage which it could take of a position of law, it is not open to such party to change and say that it can avail of that ground. This finding of the Supreme Court is clearly not applicable to the facts of the case before me. As said above, the respondent has been claiming tenancy in respect of the suit land, he is in possession of the suit land since prior to 1969 and question, therefore, is in what capacity he is in possession. No doubt, on the first available opportunity, the respondent could have sought decision on the question of tenancy, but he gave up that opportunity. But, in view of the above observations of our High Court that tenancy is a statutory right and cannot be given up without following due process of law as provided in Section 19 of the Act, the respondent

could have brought up the issue of tenancy when the petitioners filed their suit for eviction. The petitioners were trying to brand the respondent as trespasser of the suit land. It was, thus, necessary for the respondent to show that as to in what capacity he was in possession of the suit land. At that time, he had every right to get question decided by the Tenancy Court.

Thus, the Tahasildar and learned Member of the Maharashtra Revenue Tribunal committed error when they held that the application was not maintenable. It is clear that the judgment of the Deputy Collector, Land Reforms, Latur, was proper and correct. The learned Deputy Collector, had rightly, directed the Tahsildar to decide the application made by the respondent under Section 8 and decide the question as to whether the respondent is or was at any time a tenant in respect of the suit land. That order is required to be restored.

The judgment of the learned Member, Maharashtra Revenue Tribunal apparently favoured the petitioners. Surprisingly they still challenged it here. The impugned judgment in fact, adversely affected the interest of the respondent, but the respondent did not challenge it. Nonetheless, the respondent got an opportunity to argue his point of view before this court. The purpose of the petitioners, in filing this petition, was limited and probably, they wanted the learned Member, MRT, to hold that, the Deputy Collector, Land Reforms, Latur, instead of remanding the matter back to the Tahsildar should have dismissed the appeal of the respondent. They also wanted this court to correct the order of the learned Member, MRT to that extent. But, as said above, due to their rather short sighted approach to the impugned judgment, they filed this petition and provided an opportunity to the respondent to point out legality and correctness of both the orders, order passed by the Tahsildar as well as the Member, MRT.

The petition is, therefore, disposed of in terms of following order.

The impugned judgment passed by the Member, MRT, is quashed and set aside. The order of the Dy. Collector is restored to file. Needless to mention, the Tahsildar shall decide the case on its own merit without getting influenced by the observations made herein above.

(A.V.NIRGUDE, J.)

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